

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

LUCIANO TONELLI, ) CASE NO. C05-0376-RSL-MAT  
Plaintiff, )  
v. ) REPORT AND RECOMMENDATION  
SARGENT AUTRY, et al., )  
Defendants. )

INTRODUCTION

Plaintiff is a Washington state prisoner proceeding *pro se* and *in forma pauperis* in this action brought pursuant to 42 U.S.C. § 1983. He alleges that prison guards harassed him, failed to protect him, and that a nurse at the prison failed to provide adequate medical care. Defendants have moved for summary judgment on the grounds that plaintiff has not exhausted his administrative remedies. Plaintiff has filed a response and defendants have filed a reply. Having considered the briefs submitted by the parties, the court recommends that the complaint and this action be dismissed without prejudice for failure to exhaust.

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01 . (Doc. #31). On October 19, 2005, plaintiff filed a motion for an extension of time to respond  
02 to defendants' motion for summary judgment. (Doc. #32). The court granted plaintiff's motion  
03 and on November 30, 2005, plaintiff filed his response. (Doc. #38). Defendants filed a reply on  
04 December 1, 2005 (Doc. #37), and the matter is now ready for review.

#### 05 DISCUSSION

06 Defendants base their motion for summary judgment on several grounds. The court need  
07 only address their initial ground that plaintiff has failed to exhaust his administrative remedies, as  
08 required by the Prison Litigation Reform Act ("PLRA"). *See* 42 U.S.C. § 1997e(a). Under the  
09 PLRA:

10 No action shall be brought with respect to prison conditions under section  
11 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison,  
12 or other correctional facility until such administrative remedies as are available are  
13 exhausted.

42 U.S.C. § 1997e(a).

14 The Supreme Court explained the rationale behind this exhaustion requirement as follows:

15 **Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and**  
16 **improve the quality of prisoner suits; to this purpose, Congress afforded**  
17 **corrections officials time and opportunity to address complaints internally**  
18 **before allowing the initiation of a federal case** . In some instances, corrective  
action taken in response to an inmate's grievance might improve prison administration  
and satisfy the inmate, thereby obviating the need for litigation.

19 *Porter v. Nussle*, 122 S. Ct. 983, 988 (2002) (citations omitted; emphasis added). *Id.* Thus,  
20 exhaustion is now a precondition for a prisoner, such as plaintiff, to bring an action pursuant to  
21 § 1983.

22 The Washington prison system has a grievance procedure that provides four different levels

01 of review. (Dkt. #31 at 10). Plaintiff attached to his complaint copies of grievances that he claims  
02 to have filed with the prison grievance system. However, defendants contend that plaintiff either  
03 did not actually file some of these grievances or if he did, he did not appeal them beyond the first  
04 level.

05       Upon review of the record, it appears that defendants are correct. Plaintiff filed two  
06 grievances against defendant Siivonen in which plaintiff alleged that the guard had verbally  
07 harassed him by referring in a derogatory manner to plaintiff's sexual orientation. However,  
08 plaintiff withdrew the first grievance and did not provide sufficient information on the second.<sup>2</sup>  
09 (Dkt. #31, Ex. 5, Attachments A & C). In addition, the court notes that even if plaintiff had  
10 exhausted his available remedies regarding these offensive comments, the Ninth Circuit has held  
11 that the right to be free from cruel and unusual punishment is not violated by a prison guard's  
12 disrespectful comments. *See Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987)  
13 (directing vulgar language at inmate does not state a constitutional claim).

14       In addition, plaintiff's grievances regarding his other claims do not appear to have been  
15 filed with the prison grievance system. Plaintiff attached copies of these grievances to his  
16 complaint, but the copies do not have a "Log I.D. Number" at the top of the form indicating that  
17 they were accepted by a prison official and assigned a number. Defendants assert that this means  
18 that plaintiff never filed the grievances with the prison. (Dkt. #31, Ex. 5 at 4). Plaintiff maintains  
19 in his response that he did submit these forms, but that the prison erroneously did not assign a Log  
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21       <sup>2</sup> Plaintiff appears to argue in his response that this second grievance was tampered with  
22 by prison officials. (Doc. #38 at 14). However, the precise nature of the alleged tampering is  
unclear and moreover, plaintiff does not show that he pursued this grievance beyond the first level  
of review.

01 I.D. number to them. (Dkt. #38, Attachment D).

02 While it seems unlikely that the prison would fail to assign these grievances Log I.D.  
03 numbers, as plaintiff contends, the court need not resolve this dispute, because even if plaintiff  
04 did file the grievances, he does not appear to have followed through with them. He asserts that  
05 he noticed when the grievances were returned to him that the forms lacked I.D. numbers and that  
06 they contained no written response from prison officials, yet plaintiff does not assert that he  
07 brought these defects to anyone's attention. (Dkt. #38, Attachment D). As mentioned, there are  
08 four levels of review available to prisoners and plaintiff apparently did not pursue any of the  
09 defective grievances higher than the first level.

10 Thus, it appears clear that plaintiff did not exhaust his administrative remedies as required  
11 under the PLRA. Consequently, the court has no choice but to dismiss this lawsuit without  
12 prejudice for failure to exhaust. *See Porter v. Nussle*, 122 S. Ct. 983, 988 (2002).

13 CONCLUSION

14 For the foregoing reasons, the court recommends that the complaint and this action be  
15 dismissed without prejudice for failure to exhaust administrative remedies. *See* 42 U.S.C. §  
16 1997e(a). A proposed Order accompanies this Report and Recommendation.

17 DATED this 13th day of December, 2005.

18 

19 Mary Alice Theiler  
20 United States Magistrate Judge  
21  
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